Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-23-36 OF 2001
ABDUL MALIK ISHAK J
16 NOVEMBER 2002

Civil Procedure *— Preliminary issue — Application for issue or question raised in pleadings to be tried on preliminary basis — First defendant allegedly blacklisted plaintiff wrongfully pursuant to first defendant's BMC Guidelines — Plaintiff sued defendants for defamation and negligence — Preliminary issue or question on whether BMC Guidelines were ultra vires and unlawful under s 30(1)(mmmm) of the Central Bank of Malaysia Act 1958 — Whether outcome of preliminary issue or question would result or substantially result in disposal of case — Whether there would be a substantial saving of expense and time — Rules of the High Court 1980 O 33 r 2*

The plaintiff sued the defendants for defamation and negligence arising out of an incident in which the first defendant was said to have wrongfully blacklisted the plaintiff under the first defendant's 'Biro Maklumat Cek Operational Framework and Reporting Guidelines' ('BMC Guidelines'). The BMC Guidelines were issued by the first defendant pursuant to the Central Bank of Malaysia Act 1958 ('the Act'). This was the plaintiff's application (in encl 16) for an issue or question raised in the pleadings of this suit to be tried on a preliminary basis under O 33 r 2 of the Rules of the High Court 1980 ('the RHC') on the grounds that it would save considerable time and costs. The issue or question to be tried was whether the BMC Guidelines were ultra vires and unlawful under s 30(1)(mmmm) of the Act. Section 30(1)(mmmm) of the Act permitted the first defendant to establish a central bureau to collect information relating to the rejection by a paying bank of any cheque for reason of insufficient funds in the account of the drawer of the cheque and to disclose any such information to any bank for the purpose only of assisting the bank to assess the eligibility of the said drawer to maintain or open any current account with the bank. The plaintiff's counsel submitted that s 30(1)(mmmm) of the Act cannot be construed so as to give powers to compulsorily blacklist a bad cheque offender. The first defendant's contention was that this court should not invoke its discretionary powers under O 33 r 2 of the RHC since the determination of the preliminary issue or question would not substantially dispose of the cause or matter. This was because whether the BMC Guidelines were valid or otherwise, this court would still have to decide on the issue of whether the alleged maintenance of the blacklist amounted to a defamatory statement. Furthermore, transmission of information to the first defendant in the instant case was in coded form and the question of whether there was publication can only be determined at the trial proper by way of viva voce evidence. In this regard, extrinsic evidence would be required to be adduced to ascertain whether or not the maintenance of the blacklist amounted to publication.

Held, dismissing the plaintiff's application:

(1) Order 33 r 2 of the RHC conferred upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter. An application under O 33 r 2 of the RHC was not appropriate where the facts were in dispute or where extrinsic evidence was required to be adduced. The overriding consideration to take into account was whether the application would result in a substantial saving of time and expenditure. In addition, the court should also be wary and warn itself against the abuse of this process (see p 154E–G).

(2) Even if the court were to find the BMC Guidelines to be ultra vires, that outcome would not result or substantially result in the disposal of the case. The plaintiff's actions for libel and negligence were distinct causes of action and independent of whether the BMC Guidelines were valid or otherwise. The disposal of the proposed question in encl 16 would not render the trial for the actions of libel and negligence unnecessary as this court must also determine whether the legal ingredients for the actions of libel and negligence had been satisfied. Accordingly, if this court were to try the preliminary point as framed in encl 16, there would not be a substantial saving of expense and time (see pp 167E–F, 168G–I).

[**Bahasa Malaysia summary**

Plaintif mendakwa defendan-defendan untuk fitnah dan kecuaian yang timbul dari satu kejadian di mana defendan pertama dikatakan telah dengan salahnya menyenarai hitamkan plaintif di bawah 'Biro Maklumat Cek Operational Framework and Reporting Guidelines' ('Garis Panduan BMC') defendan pertama. Garis Panduan BMC dikeluarkan oleh defendan pertama menurut Akta Bank Negara Malaysia 1958 ('Akta tersebut'). Ini merupakan permohonan plaintif (dalam lampiran 16) agar suatu isu atau soalan dibangkitkan dalam pliding guaman ini untuk dibicarakan atas dasar permulaan di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa ia akan menjimatkan masa dan kos. Isu atau soalan yang harus dibicarakan ialah sama ada Garis Panduan BMC adalah ultra vires dan menyalahi undang-undang di bawah s 30(1)(mmmm) Akta tersebut. Seksyen 30(1)(mmmm) Akta tersebut membenarkan defendan pertama supaya mewujudkan satu pusat biro untuk mengumpul maklumat berhubung dengan penolakan oleh satu bank pembayar atas mana-mana cek dengan alasan kekurangan wang dalam akaun pembayar cek dan untuk mendedahkan maklumat demikian kepada mana-mana bank untuk tujuan semata-mata membantu bank menilai keupayaan pembayar tersebut untuk mengekal atau membuka mana-mana akaun semasa dengan bank. Peguam plaintif berhujah bahawa maksud s 30(1)(mmmm) Akta

tersebut tidak boleh ditafsir sehinggakan memberi kuasa untuk semestinya menyenarai hitamkan seorang pesalah cek tendang. Hujah defendan pertama adalah bahawa mahkamah ini tidak harus menggunakan kuasa berdasarkan budi bicara di bawah A 33 k 2 KMT oleh kerana penentuan isu atau soalan permulaan tidak akan menyelesaikan kausa atau perkara secara substantial. Ini adalah kerana sama ada Garis Panduan BMC adalah sah atau sebaliknya, mahkamah ini masih tetap harus memutuskan isu tentang sama ada pengekalan senarai hitam yang dikatakan membawa kepada satu pernyataan berfitnah. Tambahan pula, penyampaian maklumat kepada defendan pertama dalam kes ini adalah berbentuk kod dan soalan sama ada berlakunya terbitan hanya boleh diputuskan di perbicaraan sebenar melalui keterangan viva voce. Berhubung hal ini, keterangan luar perlu dikemukakan untuk menentukan sama ada pengekalan senarai hitam berjumlah kepada terbitan.

Diputuskan, menolak permohonan plaintif:

(1) Aturan 33 k 2 KMT memberikan mahkamah kuasa berdasarkan budi bicara yang luas untuk memutuskan sebarang soalan atau isu dalam satu kausa atau perkara, sama ada mengenai fakta atau undang-undang atau sebahagian fakta dan sebahagian undang-undang, untuk dibicarakan sebelum, semasa atau selepas perbicaraan sesuatu kausa atau perkara. Satu permohonan di bawah A 33 k 2 KMT tidak wajar bila mana fakta-fakta dipertikaikan atau di mana keterangan luar perlu dikemukakan. Timbangan paling utama untuk diambil kira adalah sama ada permohonan tersebut akan mengakibatkan penjimatan masa dan perbelanjaan yang substantial. Tambahan pula, mahkamah juga harus berwaspada dan berjaga-jaga terhadap penyalahgunaan proses ini (lihat ms 154E–G).

(2) Jikapun mahkamah mendapati Garis Panduan BMC adalah ultra vires, keputusan tersebut tidak akan mengakibatkan atau secara substantial mengakibatkan penyelesaian kes. Tindakan plaintif untuk fitnah dan kecuaian merupakan kausa tindakan berlainan dan bebas daripada sama ada Garis Panduan BMC adalah sah atau sebaliknya. Penyelesaian soalan yang dicadangkan dalam lampiran 16 tidak menyebabkan perbicaraan untuk tindakan fitnah dan kecuaian tidak perlu kerana mahkamah ini mesti juga memutuskan sama ada unsur-unsur perundangan untuk tindakan fitnah dan kecuaian telah dipenuhi. Oleh yang demikian, sekiranya mahkamah membicarakan hujah permulaan seperti yang dirangka dalam lampiran 16, penjimatan perbelanjaan dan masa yang substantial tidak mungkin berlaku (lihat ms 167E–F, 168G–I).]

Notes

For cases on preliminary issue, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 4903.

Cases referred to

Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London [1993] 3 MLJ 193 (refd)
Carl-Zeiss-Stiftung v Herbert Smith [1968] 2 All ER 1002 (refd)
Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313 (refd)
Commonwealth Shipping Representative v P & O Branch Services [1923] AC 191 (refd)
Dawson v Lunn (1984) 149 JP 491 (refd)
Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor; Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor [1997] 2 MLJ 252 (refd)
Everett v Ribbands & Anor [1952] 2 QB 198 (refd)
Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 (refd)
Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) and another case [2000] MLJU 610; [2001] 5 CLJ 73 (refd)
Holland v Jones (1917) 23 CLR 149 (refd)
Huang Ee Hoe & Ors v Tiong Thai King & Ors [1991] 1 MLJ 51 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)
Thanaraj all Manikam & Ors v Lower Perak Tamil Co-operative Society [1997] 4 MLJ 82 (refd)
The Attorney-General & Ephraim Hutchings (Relator) v The Directors of the Great Eastern Railway Company [1880] 5 App Cas 473 (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 ss 2, 30(1)(mmmm)
Rules of the High Court 1980 O 33 r 2
Banking and Financial Institutions Act 1989 ss s 43(3), 114

Amir bin Ismail (*Goh Peng Hong* and *Tee Kim Chan* with him) (*Edmund Ponniah & Tee*) for the plaintiff.
Porres Royan (*Shook Lin & Bok*) for the first defendant.
Adibah Ishak (*Nur Nadia bte Mohd Amin* with her) (*Michael Chen, Gan, Muzafar & Azwar*) for the second defendant.
Chen Siew Mei (*Raslan Loong*) for the third defendant.

Abdul Malik Ishak J:

Introduction

This is the plaintiff's application in encl 16 by way of a summons in chambers for an issue or question raised in the pleadings of this civil suit to be tried on a preliminary basis under O 33 r 2 of the Rules of the High Court 1980 ('the RHC') on the grounds that it would save considerable time and costs. In its original text, encl 16 is worded in this way:

> Let All Parties concerned attend before the judge in chambers on the hearing of an application on the part of the plaintiff abovenamed for an order that the following question or issue raised by the pleadings in this action be tried as a

preliminary issue before the trial of the other questions or issues in this action pursuant to O 33 r 2 of the Rules of the High Court 1980 and that until the determination of the preliminary issue all further proceedings in this action be stayed AND THAT such further or other directions be given for the trial of the said preliminary issue as may be necessary AND THAT the costs for this application be costs in the cause.

The above-mentioned question or issue is the following:

Upon the facts pleaded in paras 17, 18, 19, 20 and 21 of the statement of claim namely:

17 The first defendant being a body established by statute and charge(d) under the law with the smooth and fair and efficient functioning of the banking system and industry through a sound financial structure for the country is under a statutory duty to ensure the proper and fair administration by any bank under its jurisdiction with member or members of the public. It has, amongst its many business(es), a duty as described under s 30(1)(mmmm) of the Central Bank of Malaysia Act 1958 ('the said Act').

18 Pursuant to the said Act the first defendant issued a set of guidelines known as the Biro Maklumat Cek Operational Framework and Reporting Guidelines ('BMC Guidelines') but in breach of its duty under the said Act the said BMC Guidelines provides for a mandatory procedure to blacklist by the first defendant on a global concept against a member of the public.

19 The said BMC Guidelines are ultra vires the said Act and is made in excess of the powers of the first defendant under the (said) Act.

20 Further it is the contention of the plaintiff that notwithstanding anything stated in any legislation any powers which the first defendant may have and especially in relation to any powers that may be used to the detriment of the plaintiff or any other member of the public when exercised has to be exercised judiciously and in accordance with the principles of natural justice.

21 It is also the contention of the plaintiff that such powers as blacklisting a member of the public should in any case be declared illegal as the same when exercised is highly draconian, onerous, inhuman and against all tenets of justice.

and paras 21A and 21B of the defence of the first defendant, namely:

21A The first defendant admits para 17 of the amended statement of claim.

21B The first defendant admits that it issued the said BMC Guidelines as alleged in para 18 of the amended statement of claim but denies the rest of the paras 18, 19, 20, 21 and 22 of the amended statement of claim. The first defendant will rely on the said Act and the Banking And Financial Institutions Act 1989 (Act 372) for its position that the BMC Guidelines are lawful and valid.

WHETHER the 'Biro Maklumat Cek Operational Framework and Reporting Guidelines' issued by the first defendant herein in February 1999 is ultra vires and unlawful under the provisions of s 30(1)(mmmm) of the Central Bank of Malaysia Act 1958 or any other laws of Malaysia.

The grounds of this application are that the trial of that preliminary issue will result in a substantial saving of time and expenditure with respect to the trial of the action and is more convenient for all parties concerned.

It is indeed an interesting application as it adds colour to the otherwise mundane court work. Order 33 r 2 of the RHC states as follows:

> The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

and the relevant principles governing an application under this rule can be distilled, inter alia, from these three cases:

(1) *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 — a decision of the Supreme Court;

(2) *Arab Malaysian Finance Bhd v Meridien International Credit Corporation Ltd London* [1993] 3 MLJ 193 — another decision of the Supreme Court; and

(3) *Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor, Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252 — a decision of the Court of Appeal.

Of course, there are other germane authorities on the subject that can be found in the local law journals but, for the present moment, the above three authorities would suffice. However, in the course of this judgment, I will refer to other elucidating authorities, both local and foreign. The principles of law that can be distilled from the long line of established authorities may conveniently be marshalled in these terms:

(i) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter;

(ii) that the application under O 33 r 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced;

(iii) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and

(iv) that the court should be wary and warn itself against the abuse of this process.

Applying these salient principles to encl 16, it is the contention of the first defendant that this court should not invoke its discretionary powers under O 33 r 2 of the RHC because it would not result in a substantial saving of time and expenditure. It is the submission of Mr Porres Royan, the learned counsel for the first defendant, that the determination of the proposed question in the preliminary hearing would not have the effect of substantially disposing of the cause or matter. Going into specifics, Mr Porres Royan submitted that the issue as to whether the BMC Guidelines are valid or otherwise will not substantially dispose of the

plaintiff's claim in libel and the other defences pleaded by the other defendants. The second and the third defendants through their respective counsel, echoed the sentiments of Mr Porres Royan. The plaintiff, on the other hand, through its learned counsel in the person of En Amir bin Ismail held opposite views and he vigorously submitted that the application in encl 16 is properly made under O 33 r 2 of the RHC and that this court ought to entertain it.

Arguments of the parties and the exposition of the law

It is the submission of En Amir bin Ismail for the plaintiff that the application in encl 16 is not only appropriate but it is also within the contemplation of O 33 r 2 of the RHC and it is because of this that he says that the application should be dealt with in advance. He proceeds to submit on the following lines:

(1) that the application in encl 16 can be disposed of quickly and simply as it is purely a question of law;

(2) that the issue involved is quite obvious and that there is no lengthy and tedious arguments to pursue and it can simply and quickly be determined by the court; and

(3) that it is a singular point of law of general importance which has hitherto affected a diverse cross section of the public and that it can be argued and concluded without any reference to and quite independent of the evidence or to the facts of the matter at hand.

At first blush, all these submissions are quite attractive.

On the relevant principles to be applied in construing whether the preliminary issue there ought to be tried, Chan Sek Keong J in the Singapore's Court of Appeal case of *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 had this to say (see pp 394–395 of the report):

> Thirdly, we are in full agreement with counsel with respect to the powers of the court under O 33 r 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before, at or after the trial of the cause or matter. It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law. An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.
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> In *Everett v Ribbands* [1952] 2 QB 198, Romer LJ began his judgment by stating that the point of law before the court should have been set down as a preliminary point before the hearing as the action was a substantial one and estimated to last three days. Similarly in *Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186, the judge adopted the same approach. In that case, there was a dispute amongst the children of the deceased with regard

to the validity of his will. PC, a named beneficiary, applied for probate in July 1969 in Malaysia. SC, a disinherited son, commenced an action in September 1969 in India against PC and other beneficiaries under the will in connection with the properties of the deceased in India as well as in Malaysia. The action was settled in June 1972 by a consent order under which SC was given a share in the deceased's estate. In 1976, PC brought another action to have the consent order declared null and void. The action was dismissed in June 1978. PC's appeal to the High Court of Madras was also dismissed. SC then applied in the Malaysian action for an order that a preliminary issue as to whether PC was estopped per rem judicatam from contending that the will was valid, or applying for probate, be tried. The judge allowed the application on the ground that if the point was res judicata, then it would not be necessary to try the other issues, ie the deceased's capacity to execute the will, his sanity and undue influence, thus avoiding the necessity of having to obtain evidence from India on those issues, which could be expensive and time-consuming. On appeal, the Federal Court refused to interfere with the judge's decision having regard to the background of the case.

Continuing further at p 397 of the report, Chan Sek Keong J said:

> Taking all the points made by counsel for the appellants, we may state as a general rule that the court will not exercise its power under O 33 r 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the court to exercise in the circumstances of each case, bearing in mind that 'Preliminary points of law too often are treacherous short cuts. Their price can be ... delay, anxiety and expense' (per Lord Scarman in *Tilling v Whiteman* [1979] 2 WLR 401; [1979] 1 All ER 737 at p 410).

And his Lordship rounded up the matter when he said at p 398 of the report:

> In our view, Chua J applied the correct principle and took into account the relevant considerations in exercising his discretion in dismissing the appellants' application. We agreed with him that, having regard to the circumstances, this was not a proper case for an order for the trial of a preliminary issue. The appeal was accordingly dismissed with costs.

Next, it would be the case of *Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82, a decision of Kang Hwee Gee J, where the learned judge said at pp 88–89 of the report:

> Ideally, the procedure for the defendant to adopt was to plead the issue in their statement of defence under O 18 r 11 of the RHC 1980. He could then follow up by an application under O 33 r 2 and if it appears to the court that the decision on the preliminary issue substantially disposes of the case or matter or renders the trial of the cause or matter unnecessary, the court may then act under O 33 r 5 to dismiss the plaintiffs' action (see Supreme Court Practice 1985 18/11/1 at p 276). Under O 33 r 2 however, the defendant need not plead the issue of law in his statement of defence and a formal application need not be made.
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> It is clear to me firstly, that the issue of law raised in this instance would not require the ascertainment of any facts beyond those that appear in the

pleadings and secondly that a decision on the issue if favourable to the defence would render the trial unnecessary which could only lead to much savings and costs. I therefore fail to see why the defendant should not be allowed to proceed with their application.

This would be followed by the case of *Huang Ee Hoe & Ors v Tiong Thai King & Ors* [1991] 2 MLJ 51, where Chong Siew Fai J (as he then was) endorsed the speech of Lord Denning MR in *Carl-Zeiss-Stiftung v Herbert Smith* [1968] 2 All ER 1002, as can be seen at p 54 of the report:

> As stated by Lord Denning MR in *Carl-Zeiss-Stiftung v Herbert Smith* [1968] 2 All ER 1002 at p 1004:
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> > 'The true rule was stated by Romer LJ in *Everett v Ribbands* [1952] 2 QB 198. Where there is a point of law which, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards. I have always understood such to be the practice.'

Another case in point would be that of *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) and another case* [2000] MLJU 610; [2001] 5 CLJ 73, and there, after reproducing O 33 r 2 of the RHC, I had this to say (see pp 97-104 of the MLJU report; pp 130–134 of the CLJ report):

> ... and the court certainly has the wide discretion to order the preliminary issue as framed to be tried even before the trial of the cause or matter. The preliminary issue as framed can conveniently be said to be 'partly of fact and partly of law' and it is not a fictitious question. All the interested parties are present and it would be ideal to adjudicate on the preliminary issue as framed. According to *Bright v Tyndall* [1876] 4 Ch D 189 and *Sumner v William Henderson & Sons* [1963] 1 WLR 823 (CA), [1963] 2 All ER 712 (CA), the court will decline to hear fictitious questions where the events had not happened. It must be borne in mind that 'any question or issue' that calls for determination need not arise from the pleadings but it may surface through some other means and this is made possible by the existence of the phrase 'or otherwise' that appears in O 33 r 2 of the RHC. Fortunately, the preliminary issue as framed arose from the pleadings as well as through the documents that were referred to by the parties in the course of their arduous submissions. The preliminary issue as framed was not only bandied around by the parties during their submissions but it was also alluded to by James Foong J in his written judgment as adverted to earlier.
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> Reverting back to the case of *Bright v Tyndall*, Malins VC was confronted with a special case to interpret the will of Mr Tyndall, a well known banker at Bristol who died leaving a very large fortune and six daughters who survived him and who were all alive at the material time. The property of Mr Tyndall was to be distributed in this way: 'After the death of his daughters, the share of each daughter is given to the sons of the daughters who shall attain twenty-one and to the daughters who should marry under twenty-one, omitting the usual provision that the property shall vest in daughters who attain twenty-one or marry under that age.' A question was posed under a special case for his Lordship to decide: Whether in the event of a daughter having daughters who attain twenty-one, and do not marry before, do they take a vested interest?

Malins VC declined to decide the question as he was of the view that it would be injurious to the parties to decide the question until the events actually happened which would give rise to the question. At p 197 of the report, Malins VC had this to say:

> 'Now, the inconvenience of deciding such cases as this by anticipation is manifest. Suppose I were to come to the conclusion that no daughter that does not marry under twenty-one can take an interest, then I have taken away from the daughter, if such an event should arise, the chance of making the best she can of such a case when it does arise; and I have by anticipation made a declaration that she does not take an interest when there is no occasion for doing so whatever. The only reason suggested to me is that these young ladies when they marry ought to know whether the sons and daughters are to take, or whether only the daughters of a particular class are to take, viz, those who marry under twenty-one. I cannot regard that as a circumstance which renders it absolutely necessary that this question should now be decided. That the court will not, in all cases, decide such questions as a matter of course is most formally decided in *Garlick v Lawson* 10 Hare, pp, xiv by Vice Chancellor Wood, the same learned judge who decided *Bell v Cade* 2 J & H 122.'

and the headnote merits reproduction where it states that:

> 'Upon a special case to obtain a decision whether persons not *in esse* would be entitled, under certain circumstances which might never arise, to a share in property, the court declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question.
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> Where the interests of the parties to a special case are not of such a nature as to give the court jurisdiction to decide the questions, the court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision.'

Factually speaking the facts in *Bright v Tyndall* can readily be distinguished. There the special case was posed when the events had not occurred as yet. Here, on the other hand, the preliminary issue as framed arose from a set of facts where the events had occurred. There the Act of Sir George Turner contained the following provision:

> 'Provided, also, that if, upon the hearing of such special case as aforesaid, the court shall be of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the said court may refuse to decide the same.'

Here, O 33 r 2 of the RHC do not contain such a provision. However, O 33 r 5 of the RHC makes for an interesting reading; it states as follows:

> 'If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately form the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.'

In *Sumner v William Henderson & Sons Ltd*, a special case was submitted by the parties and the court had to decide the following preliminary questions of law for its opinion:

(1) whether the defendants as employers could be liable for any negligence of the skilled and competent persons who had supervised and carried

A out the specialized work involved in the construction of the building which required skill and knowledge not possessed by the defendants; and

(2) whether they could be held liable for any negligence by a reputable manufacturer of the cable.

B Sumner claimed damages under the Fatal Accidents Act 1846 to 1959, in respect of the death of his wife who was employed by the defendants as restaurant supervisor in the defendants' store. Fire broke out in that store and his wife was asphyxiated by smoke in the course of her employment. The cause of the fire was not agreed upon by the parties. Phillimore J (see [1963] 1 All ER 408) determined the questions of law raised by the special case and he held that the defendants would be liable in law for any negligence of certain C contractors and electrical engineers. The defendants appealed and the Court of Appeal (Sellers, Donovan and Russell LJJ) allowed the appeal and Sellers LJ delivering the judgment of the Court of Appeal had this to say (see pp 713-714 of the report):

> 'In the present case no facts have been agreed and what the outcome of the evidence will be is most uncertain. It does not seem to us in the D interests of either party that a hypothetical decision should be reached now. It might tie one or other of the parties to a decision which the facts might reveal as erroneous. Time is running out against possible claims against other parties, either directly by the plaintiff or as claims over for indemnity by the defendants, and we do not think that a decision now on the matters raised will satisfactorily relieve the parties from protecting E themselves accordingly.
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> In our view the procedure by this special case was wrong; no judgment should have been given under it and it cannot properly be further pursued. We therefore, on this ground only, set aside the judgment given, so that the parties are free to argue the legal position on established facts, and we proceed no further with this appeal.'

F Now, the marked differences between the present case and that of *Sumner* would be this. Here Fulcrum had extended the loan under the facility agreement to the defendants and the defendants agreed that they must pay the loan. The preliminary issue as framed arose out of the submissions of the parties and it was agreed upon by Madam DR John who acted for the defendants and the same preliminary issue was alluded to by James Foong J G in his written judgment. The fact of borrowing was an established fact and this was never denied by the defendants. Whereas in *Sumner*'s case, the cause of the fire was hotly disputed by the parties and Sellers LJ was right in allowing the appeal by the defendants because the preliminary questions of law as framed would shackle the parties and prevent them from arguing 'the legal position on established facts.'

H In *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock Urban District Council* [1968] 1 Ch D 605, the Court of Appeal (Harman, Russell and Sachs LJJ) while deploring the method of adjudicating the case on a preliminary point upheld the decision of the trial judge and dismissed the appeal. Harman LJ, for instance, writing a separate judgment, at p 624 of the report, had this to say:

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> 'The defendants demurred to that claim, and an order was made on 15 July 1966, stated to be pursuant to RSC, O 33 r 3, directing the setting down of the following issue to be disposed of before the trial, namely:

> "Whether on the footing that all the allegations of fact contained in the statement of claim in this action (so far as not admitted in the defence) can be proved the plaintiffs can as a matter of law be entitled to damages or an injunction as claimed in their statement of claim."

Ungoed-Thomas J heard argument on this issue and came to the conclusion that the defendants were right, or, in other words, that the statement of claim showed no cause of action, and he dismissed the action under Rules of the Supreme Court, O 33 r 7. The plaintiffs appeal.

> At this juncture, I should like to protest against this method of procedure. This is not a preliminary point at all. It deals with the whole subject-matter of the action, and without any evidence, and the court is left in a most unsatisfactory position and has to guess at many things which, on a hearing, would be properly proved in evidence. The procedure proper to this kind of situation is by way of motion to strike out the statement of claim as showing no cause of action. That is a well-known method of putting an end to actions, without substance, but it is also well known that the court will only strike out a statement of claim in plain cases where it is clear that the action cannot possibly succeed. That procedure would be entirely unsuitable to a case like the present, in which more than a score of authorities have been cited and argument has lasted over five days. Still, we are now confronted with a position in which both parties have acquiesced.'

Finally, Harman LJ rounded it up by saying at p 628 of the report:

> 'For all those reasons, while deploring the method by which the action has been conducted, I cannot but come to the conclusion that the statement of claim discloses no valid cause of action, and the case was, therefore, rightly dismissed by the judge as he had power to do under r 7 of O 33.'

Here, the preliminary issue as framed would be tried in open court where the parties have the right to call witnesses. The full rigmarole of the trial will be conducted in adjudicating the preliminary issue as framed. Everything will be placed above board for the scrutiny of everyone. It would be pointless to have O 33 r 2 of the RHC as part and parcel of our procedure if we do not give effect to it. The Rules Committee saw it fit to incorporate this procedure in the RHC and this court must give effect to it. The preliminary issue as framed had a mixture of fact and law — all nicely framed to be adjudicated upon. This was my judgment and I so hold accordingly.

En Amir bin Ismail is quite painstaking. He dutifully takes me to appreciate the background facts of the case. He says that as can be seen from the pleadings of all the parties in the present civil suit, this case arises from an incident where the first defendant is said to have wrongfully blacklisted the plaintiff and, as a result thereof, the second and the third defendants also followed suit by blacklisting the plaintiff. He is very careful with his choice of words. But the sting of the plaintiff's wrongdoing is aptly explained by Mr Porres Royan in a well crafted submission. Mr Porres Royan submits that the first defendant receives electronically through the Financial Institution Network ('FINET') from a reporting bank the 'List of Bad Cheque Offenders Information Received From FI' containing information

which reports that the plaintiff is allegedly a bad cheque offender. The Biro Maklumat Cek system compiles the reports which it receives from all the licensed banks and puts it on a list of bad cheque offenders known as the BMC Offenders Blacklist ('the List'). Now, whether or not the maintenance of the list is defamatory is not dependent, according to Mr Porres Royan, on the validity or otherwise of the BMC Guidelines. Mr Porres Royan submits further that whether the BMC Guidelines are valid or otherwise, this court will nevertheless have to decide the issue of whether or not the alleged maintenance of the list amounts to a defamatory statement which tends to injure the reputation of the plaintiff. Mr Porres Royan submits that all these would entail the adducing of evidence in regard to the said system and its workings and operations and a trial under O 33 r 2 of the RHC cannot be an appropriate mechanism by which this can effectively be done. Mr Porres Royan then proceeds full steam ahead. It is his submission that no action for a libel will lie unless there has been publication in the form of communication of a defamatory matter to a third person. It is also his submission that even if the BMC Guidelines are found to be ultra vires, that does not ipso facto mean that there was publication of the alleged defamatory statement. At any rate, I note that the first defendant has pleaded that there was, in fact, no publication in law. I too note that the first defendant also pleaded that the disclosure of the list of bad cheque offenders is transmitted via FINET in coded form. Arising out of these, Mr Porres Royan submits that whether there was publication or otherwise is a question of fact which can only be determined at the trial proper by way of a viva voce evidence. So, according to Mr Porres Royan, the plaintiff's application under O 33 r 2 of the RHC is inappropriate because there are facts in issue and extrinsic evidence will be required to be adduced to ascertain whether or not the maintenance of the list amounts to publication.

Reverting back to the issue of blacklisting the plaintiff, En Amir bin Ismail submits that all the defendants were relying on the fact that they were compelled by an obligation imposed on them by the BMC Guidelines — referring to the 'Biro Maklumat Cek Operational Framework and Reporting Guidelines', and that BMC Guidelines was said to be issued by the first defendant in February 1999 pursuant to the provisions of s 30(1)(mmmm) of the Central Bank of Malaysia Act 1958 ('the Act'). It is the contention of En Amir bin Ismail that the BMC Guidelines are ultra vires and unlawful under the provisions of s 30(1)(mmmm) of the Act or any other laws of Malaysia. En Amir bin Ismail then proceeds to refer in extenso to paras 17, 18, 19, 20 and 21 of the statement of claim which were reproduced earlier and he too refers to paras 21A and 21B of the statement of defence of the first defendant which were also reproduced earlier. He then reads s 30(1)(mmmm) of the Act which states as follows:

> Authorized business of Bank
>
> (1) The Bank may —
>
> (mmmm) establish a central bureau to collect, in such manner and to the extent as the bank may think fit, information on and relating to rejection by a paying bank of any cheque for reason of insufficient funds in the account of the drawer of the cheque, and to disclose any

> such information to any bank for the purpose only of assisting the bank to assess the eligibility of the drawer to maintain or open any current account with the bank;

and he asks this court to refer to s 2 of the Act which uses the word 'bank' with a small letter 'b' to refer to the retail banks and the word 'Bank' with a capital 'B' to refer to the first defendant. Similarly he urges this court to refer to the Banking and Financial Institutions Act 1989 ('BAFIA') which makes the same references. Flowing from that En Amir bin Ismail submits that s 30(1)(mmmm) of the Act expressly and clearly provides for the following set of situations:

(1) the power to establish a central bureau to collect and to disclose information relating to the rejection of bad cheque of a customer by a paying bank for reason of insufficient funds in the account of the drawer of the cheque; and

(2) for the purpose of assisting the retail banks to assess the eligibility of the drawer to (a) maintain, or (b) open any current account with the said bank.

En Amir bin Ismail then proceeds to submit along these lines. That the collection and disclosure of information by the central bureau is to be done purely for the sole purpose of assisting the licensed bank in assessing the eligibility of account holders to maintain or open a current account with the licensed bank. That nowhere in the legislation does it say that the first defendant can or should carry out a compulsory blacklisting of an account holder, let alone an innocent member of the public who is not an account holder of the complainant bank like the plaintiff in the present case. He emphasizes with some measure of seriousness that s 30(1)(mmmm) of the Act is an empowering provision which empowers the setting up of the Central Bank of Malaysia or Bank Negara or the first defendant herein.

Now, ss 1.11 and 1.12.3 of the BMC Guidelines provide, inter alia, that there shall be a global closure of the offender's account and in particular s 1.9.4 thereof provides that:

> Other banks, where the account holder also maintains a current account, shall upon receiving the BMC Offenders Blacklist, also take steps to close all relevant accounts within one month from the date of receipt of the blacklist.

En Amir bin Ismail is not too happy with the BMC Guidelines. He says that under it all the recalcitrant blacklisted account holder accounts and banking facilities would be closed and recalled. He says that it is a mandatory procedure for all licensed banks to be compelled to follow the directions of the first defendant by blacklisting an account holder on a global basis and he says that this is wrong and clearly unauthorized by the statutes. In strong words, En Amir bin Ismail submits that such blacklisting is punitive in nature. He begs this court to take judicial notice that banking accounts are almost an essential necessity of modern life. It is used by a diversity of people, ranging from students to billionaires. He says that even the government pension cheques and tax collections are now paid through the

banking systems and that the salaries of government employees are paid through bank accounts. He submits that it is impossible for anyone to function normally if he or she is blacklisted and has no bank account. He then submits that the effects of blacklisting are both draconian and heinous and it can only be considered as lawful if it is authorized by a specific and clear statutory legislation.

I have this to say in regard to judicial notice.

The general rule governing reception of evidence is this. That all the facts in issue which are relevant to the case must be proved by evidence — through the testimony of witnesses and the production of documents. But the court do take judicial notice by declaring that the state of facts exist. Thus, during the holy month of Ramadhan it is not necessary for the party who desires to establish that it is a fasting month to call witness to swear to that fact because this is a matter of which judicial notice is taken. Thus, in the words of Lord Sumner in the case of *Commonwealth Shipping Representative v P & O Branch Services* [1923] AC 191 at p 212:

> Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.

It would be pointless in the extreme to prepare a list of instances supported by authorities to show that the courts have taken judicial notice of facts without making the necessary inquiry. It is suffice to say that once the fact in question is too notorious to be the subject of serious dispute, then the court can and should take judicial notice of the same. But it must not be forgotten that some judges are better equipped than their counterparts and these superior judges — superior in their intellect and ability, may probably take judicial notice of a wider range of matters. Be that as it may, it is a correct proposition of the law to say that within reasonable and proper limits, a judge may make use of his special knowledge of general matters in order to take judicial notice of a state of facts (*Dawson v Lunn* (1984) 149 JP 491). According to Isaacs CJ in *Holland v Jones* (1917) 23 CLR 149 at p 153 that the basic essential is that the fact judicially noticed should come within the category that all persons are aware of. I would therefore take judicial notice that opening an account with a bank is a modern way of Malaysian life.

En Amir bin Ismail proceeds further and he submits endlessly, focussing his attention to the BMC Guidelines. He criticizes the BMC Guidelines and he says that it is a bad guideline because there is no procedure for any check and balance. He says that there is no inquiry before an individual is blacklisted. He says that all that needs to be done is by way of a complainant bank submitting the name of the individual — like the present plaintiff who was said not to be an account holder of the complainant bank, and he is then blacklisted by the first defendant. In serious vein, he submits that there is even the possibility of abuse on the part of vindictive people within the banks who would abuse the system with cold blooded calculation to destroy an individual monetarily and financially by

abusing the system. It is contended on behalf of the plaintiff that this cannot be the intention of the legislature and that the provisions of the statute cannot oust the age old doctrines of natural justice and the right to fair hearing. It is the submission of En Amir bin Ismail that the maxim audi alteram partem should be applied vigorously for the plaintiff. He then submits with vigour and vitality by stating that the mere act of blacklisting with its attendant consequences must have been known to Parliament and that it cannot be right that Parliament would have given such powers to the first defendant without ensuring that the provisions of natural justice are complied with. He draws my attention and makes reference to *Cross on Statutory Interpretation* where the learned author at p 11 thereto writes:

> In *Fisher v Bell* [1961] 1 QB 394; [1960] 2 All ER 731 a shopkeeper was charged with offering a flick-knife for sale contrary to s 1 (1) of the Restriction of Offensive Weapons Act 1959 according to which 'any person who manufactures, sells or *offers for sale* or hire or lends or hires to any other person any knife sometimes known as a 'flick-knife' is guilty of an offence. The defendant had placed a flick-knife in his shop window, but the Divisional Court held that he had not offered it for sale because Parliament must be taken to have legislated with reference to the general law of contract according to which the placing of goods in a shop window constitutes an invitation to treat and not an offer. Lord Parker CJ, said:
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> > 'At first sight it seems absurd that knives of this sort cannot be manufactured, sold, hired, lent or given, but apparently they can be displayed in shop windows; but even if this — and I am by no means saying that it is — is a *casus omissus* it is not for this court to supply the omission.'
>
> It is difficult to escape the conclusion that the draftsman inadvertently omitted some such words as 'exposes for sale' or 'has in his possession for the purpose of sale', and the Restriction of Offensive Weapons Act 1961 provides for the insertion in s 1(1) of the Act of 1959, after the words 'offers for sale or hire', the words 'or exposes or has in his possession for the purpose of sale and hire'. It is unlikely that any court of the 20th century would have read these words into the 1959 Act, but the draftsman's omission, if there was one, could have been remedied by a refusal to apply the technicalities of the law of contract to a criminal case for, in their non-technical sense, the words 'offers for sale' might well be thought to apply to a shopkeeper who places goods in his shop window.
>
> We shall see that there is something to be said on both sides with regard to the merits of decisions such as *Fisher v Bell*. The important point for present purposes is that they are apt to produce a parliamentary reaction. This has been the baneful effect of the literal approach to statutory interpretation as contrasted with the approaches canvassed in *Stradling v Morgan and Heydon*'s case pp 8–9.

He then refers to the same textbook and at p 145, the learned author says this:

> To quote Lord Reid in *Black-Clawson International, Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, at p 815:
>
> > 'There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be

A presumed not to have altered the common law farther than was necessary to remedy the 'mischief'. Of course it may and quite often does go farther. But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for.'

B The presumption was one of Lord Reid's grounds for holding, contrary to the view of some other members of the House, in the *Black-Clawson* case that s 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 did not apply to judgments given in favour of a defendant simply dismissing a claim made by the plaintiff. In the earlier case of *Maunsell v Olins* [1975] AC 373, [1975] 1 All ER 16, Lord Reid had relied on this presumption in support of his C conclusion that the word 'premises' in s 18(5) of the Rent Act 1968 did not extend to farm land. The provision under construction being, in his opinion, ambiguous, he was entitled to consider how it came to be where it was, and he traced it back to s 41 of the Housing Rents and Repairs Act 1954 the object of which was to get rid of the decision in *Cow v Casey* [1949] 1 KB 474, [1949] 1 All ER 197 which was not concerned with agricultural leases. The restriction D of the scope of a statute to the immediate mischief it was designed to remedy was described by Lord Simon of Glaisdale in his dissenting speech as a misuse of the mischief rule, but Lord Reid was after all only speaking of a presumption to be called in aid in a case of ambiguity. The real difference between the majority and the dissentients in *Maunsell v Olins* was over the question whether there was an ambiguity.

E Using these passages as springboards, En Amir bin Ismail submits that there is no way in which s 30(1)(mmmm) of the Act can be construed in such a way so as to give powers to anybody to design a procedure for the compulsory blacklisting to an individual. He then draws my attention to a book entitled *Statutory Interpretation* by Salleh Buang, particularly to p 49 where the learned author states:

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> In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. If an authority is required for this, it will be found in the case of *Abbott v Middleton* (1858) 7 HLC 114.
>
> Once the literal meaning has been established then, however unjust, G arbitrary or inconvenient such meaning may be, it must receive its full effect — see *Biffin v Yorke 5 Man & G* 428. Nor is it the function of the court to scan the wisdom or policy of a statute - see *May v The Great Western Railway Co* 41 LJ QB 104 ...

Referring to the same textbook, he draws my attention to p 3 thereof and H there the learned author continues to say:

> In *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, Abdoolcader SCJ said that:
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> > 'The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must I endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ...

> The distinction between motive and intention in respect of a legislative measure is that the former relates to the policy for the enactment of the legislation in that way at that time for that purpose and the latter relates to the legal meaning of the enactment. The court is concerned with motive only to the extent that it may throw light on intention. It is the legal meaning of the enactment that in the end matters to the court, not the reason why it was passed ....'

And again he submits that there is no power vested in the first defendant to make provisions for the purpose of blacklisting the plaintiff.

Proceeding further En Amir bin Ismail contends that both the BMC Guidelines and the action of the first defendant in blacklisting the plaintiff is ultra vires and he then proceeds to refer to the case of *The Attorney-General & Ephraim Hutchings (Relator) v The Directors of the Great Eastern Railway Company* (1880) 5 App Cas 473 where the Lord Chancellor (Lord Selbourne) at p 478 of the report says:

> I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company v Riche* (Law Rep 7 HL 653). It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied; and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.

And flowing from that he submits that the words in s 30(1)(mmmm) of the Act bear a particular meaning which should be given effect to. He highlights the words 'for the purpose only of assisting' that appear in s 30(1)(mmmm) of the Act and he submits that the usage of the word 'only' must necessarily preclude any other action that the first defendant might want to take notwithstanding that the first defendant may think it necessary or useful. It is his submission that substantive ultra vires may relate to matters of law and fact and even to matters of discretion. He submits that discretionary powers must be exercised for the purposes for which they were granted and that relevant considerations should be taken into account while irrelevant considerations should be disregarded. He submits further to the effect that the discretion must be exercised in good faith and not arbitrarily or capriciously and if the repository of this power fails to comply with these requirements it acts ultra vires. He says that if a discretionary power is conferred without reference to a purpose then that discretionary power must be exercised in good faith and in accordance with such implied purpose as the courts attribute to the intention of the legislature. He continues further and he submits that the discretionary power when exercised by any authority against a subject to the subject's detriment, that discretionary power must be exercised judiciously and with reference to all the principles of natural justice because to do otherwise would render the BMC Guidelines to be draconian and against all the tenets of justice and fairness which decent people in the civilized world would understand and adhere to. These submissions are strongly worded and crafted and they are

A aimed at whittling down the powers of the first defendant. I keep an open mind. I refrain from saying anything adverse.

Mr Porres Royan submits in rebuttal and he says that the first defendant had pleaded and will definitely rely on the defence of qualified privilege. He submits that on grounds of public policy, the law affords
B protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. And that for such an occasion to arise, as a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it. Now, an occasion is said to be privileged where the person who
C makes a communication has an interest or duty — be it legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

It is submitted by Mr Porres Royan that although the legality of the BMC Guidelines is important to discern and determine whether the first
D defendant has a legal duty to communicate the list to the second defendant and the third defendant, yet the BMC Guidelines are merely a part of a wider duty imposed on the first defendant by statute. It is the contention of the first defendant that it is under a statutory or legal duty as well as a moral or social duty to maintain the list for the benefit of all the commercial banks in the country including the second defendant and the third
E defendant.

It is contended on behalf of the first defendant that even if the court finds that the BMC Guidelines to be ultra vires, yet that outcome will not result or substantially result in the disposal of the case. Indeed that is a perfectly correct contention. It must be borne in mind that the action for the
F tort of libel is a distinct cause of action independent of whether the BMC Guidelines are valid or otherwise. Since the issue as framed in encl 16 and as reproduced in the early part of this judgment fails to conclusively resolve the matter under O 33 r 2 of the RHC, one way or the other, then in the words of Chang Min Tat FJ, in the case of *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313 at p 314, it is 'an unjustified waste of time and occasions
G an equally unjustified increase in costs.' His Lordship Chang Min Tat FJ further states at the same page of the same case, the following words:

> Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense: see *Tilling v Whiteman* (1979) 2 WLR 401, per Lord Wilberforce at p 403 D–G and per Lord
H Scarman at p 410C–E.

In *Newacres Sdn Bhd v Sri Alam Sdn Bhd*, the then Supreme Court vigorously applied the principle that was laid down in the case of *Everett v Ribbands & Anor* [1952] 2 QB 198 and said (see p 476 of the judgment of Jemuri Serjan CJ (Borneo)):

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> We would interpolate to say that O 33 r 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities.

Here, in adjudicating encl 16, I found that the issue as framed cannot decisively determine and put an end to the litigation. It is part and parcel of my judgment that even if I were to hold that the BMC Guidelines that was issued by the first defendant is ultra vires — a decision that would favour the plaintiff, yet it would not be decisive as to put an end to the whole suit. The litigation would still continue. The disposal of the proposed question of law as framed in encl 16 will not and cannot render the trial of the action for defamation unnecessary. This court will still have to adjudicate on the issue of defamation. This court too will have to adjudicate on the issue of negligence.

It is interesting to note that at para 8 of the first defendant's amended defence as seen in encl 13, the first defendant has raised the issue of its immunity under s 114 of BAFIA. Now, if the plaintiff's application in encl 16 is allowed the scenario would be like this. There has to be by way of a first trial in order to determine the validity or otherwise of the BMC Guidelines and irrespective of the outcome there would then be a second trial in order to determine the issue of defamation. This would then be followed, perhaps, by a third trial in order to determine all the other outstanding issues.

In the course of his submission, En Amir bin Ismail argues that the first defendant's reliance on s 43(3) of BAFIA is irrelevant. In my judgment, this is not the correct forum nor the correct stage to determine the merits of the first defendant's defence. There were snide remarks advanced on behalf of the plaintiff that the first defendant wishes to rely on the practices of the Middle Ages or the Spanish Inquisition or the Star Chamber. Such remarks, with respect, are unwarranted and unjustified. This court would certainly interpret the secrecy provision that is housed in s 43(4) of BAFIA in the light of the prevailing Malaysian rules on statutory interpretation. Incidentally, with respect, En Amir bin Ismail did not submit as to what would happen if the BMC Guidelines are held to be valid and he seems to submit on the assumption that the BMC Guidelines are and ought to be held invalid. Again, with respect, En Amir bin Ismail submits on the assumption that the factual basis on which the torts of libel and negligence lie is not in dispute. But it is quite apparent that the first defendant has never made such a concession. In fact, Mr Porres Royan made that clear in his submission. In my judgment, there is a dire need to introduce affidavit evidence in order to establish the facts on which the application in encl 16 is hinged upon. It is also part and parcel of my judgment that if this court tries the preliminary point as framed in encl 16, there would not be a substantial saving of expense and time. Rather, in the words of Lord Wilberforce in *Tilling v Whiteman*, it would be a 'treacherous short cuts and their price can be delay, anxiety and expense.' It cannot be denied that the tort of libel and the tort of negligence are two distinct causes of actions independent of whether the BMC Guidelines are valid or otherwise. It is quite obvious that the disposal of the proposed question of law as framed in encl 16 will certainly not render the trial for the actions of libel and negligence unnecessary. Here, there are disputes of fact and law. Here, this court must also determine as to whether the legal ingredients for an action of libel and negligence have been satisfied.

A It must be recalled that it has been pleaded that the disclosure of the list of bad cheque offenders is transmitted via FINET in coded form. It must also be recalled that the first defendant has pleaded that there was no publication in law by way of a transmission via FINET in coded form. That being the case, this court has no choice but to determine and answer the question as to whether the maintenance and transmission of the list of bad B cheque offenders in coded form amounts, in law, to a defamatory statement. This is also another question of law in addition to the one that is framed and phrased in encl 16.

Conclusion

C All said and done, En Amir bin Ismail is a gentleman who practices law with an acute sense of responsibility. He submits on the law as he sees it and when questioned he magnanimously agrees that encl 16 is inappropriate for the purposes of O 33 r 2 of the RHC. I then dismissed encl 16 with costs. And I too said that costs should rightly go to the first defendant, the second defendant and the third defendant. D

Out of deference to the learned counsel on all sides, this judgment is produced to show that there is a need to be cautious when applying under O 33 r 2 of the RHC. Let this be a lesson to all legal practitioners.

Plaintiff's application dismissed.

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Reported by Lim Lee Na

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